CHENG SIAK HOR & ANOR

v.

ROZALI AHMAD

HIGH COURT MALAYA, PENANG
RK NATHAN J
[CIVIL APPEAL NO: 12-353-2000]
5 JUNE 2002

TORT: *Vicarious liability - Injury in course of employment - Whether an employment injury - Employees' Social Security Act 1969, s. 31 - Whether applicable - Whether respondent an employee of appellant - Whether claim for compensation to be allowed*

This was an appeal from the Sessions Court involving the respondent, a motor mechanic, who had sustained serious injuries resulting in paraplegia while repairing a lorry belonging to the first appellant. The respondent was lying under the said lorry when it was driven off by the second appellant.

It was argued for the appellants, *inter alia*, that as the respondent was their employee, he was caught by s. 31 of the Employees' Social Security Act 1969 ('the 1969 Act') and therefore could not recover compensation from them.

Held:

[1] In absence of an appeal against the finding that the second appellant had negligently caused the collision, the owner of the lorry was vicariously liable to the driver and the insurers, *ie*, Pacific and Orient Insurance Co. Bhd, was liable by virtue of the Road Transport Act 1987. (p 230 b)

[2] As the respondent was not an employee of the 1st appellant, the 1969 Act would not be applicable. The proviso to the amended s. 31 of the 1969 Act coupled with the repeal of s. 42 of the same Act clearly meant that the respondent was entitled to make his claim for compensation against the owner and the driver of the said lorry. (pp 229 b & 230 b)

[Respondent's claim against appellants upheld.]

Legislation referred to:
Employees' Social Security Act 1969, ss. 31, 42
Evidence Act 1950, s. 114(g)

For the appellants/defendants - Sanita Kaur Sandhu (Jaggit Singh); M/s Ajmer, Sandhu & Ong
For the respondent/plaintiff - EP Seeralasittan; M/s Chong & Poh

Reported by M Maheswaran

JUDGMENT

RK Nathan J:

Facts

On 2 October 1997 the plaintiff, a motor mechanic, had jacked up motorlorry No. PDH 7799 which had broken down along Jalan Pokok Macang Tasek Gelugor and was lying below the said lorry and repairing it. The plaintiff pleaded in his statement of claim that the said lorry belonged to the 1st defendant and was driven at all material times by the 2nd defendant as the servant or agent of the 1st defendant. Whilst the plaintiff was beneath the lorry the 2nd defendant, having mounted the said lorry started the engine and put the vehicle in motion whereby the jack fell off and the lorry landed on the plaintiff causing him severe bodily injuries resulting in the plaintiff suffering paraplegia. He then sued both the defendants for pain and suffering, loss of actual and future earnings and loss of nursing care and costs.

The Defendants' Case

In their amended defence, the defendants denied that the collision had occurred as pleaded by the plaintiff. Alternatively the defence was a plea of inevitable accident in that since the spring of the front left tyre had broken and whilst the foreman was repairing it, the defendant had started the engine and put the vehicle in motion. It must be specially noted that whilst the reference was to a foreman there was no specific reference to the plaintiff as being the foreman.

There was also a pleaded defence that since the plaintiff as contended by the defendants, was an employee of the defendants, he was caught by s. 31 of the Employees' Social Security Act 1969.

Decision Of The Sessions Court

The learned Sessions Court judge who heard the case at first instance found both the defendants totally liable and awarded damages as follows:

1)	General damages	RM150,000
2)	Future loss of earnings at RM750pm for 16 years.	RM144,000
3)	Future nursing care at RM400 for 16 years	RM 76,800
4)	Cost of diapers at RM15 per day for 16 years	RM 86,400
		RM457,200

There was also an award of interest at 8% on general damages from date of service to date of judgment.

As for special damages the court awarded:

1) As costs of wheel chair, Air bed and special toilet seat ... RM22,200.

The special damages attracted interest at 4% from date of accident to date of judgment.

The total interest amounted to RM21,961.80. There was also an award of costs.

The court rejected the plea of the applicability of the Employees' Social Security Act 1969 to this case.

Findings Of This Court

Dissatisfied with the decision of the Sessions Court the defendants appealed. Having heard full arguments I upheld the decision of the Sessions Court on the issue of liability and found the defendants fully liable. I also held that the plaintiff was not an employee of the 1st defendant and that therefore the issue of the Employees' Social Security Act 1969 applying in this case, did not arise.

On damages, I upheld the award of RM150,000 for fracture dislocation at T12/L1 with complete paraphlegia.

As for loss of future earnings I allowed the appeal. Whilst upholding the earnings of RM750 per month as his salary I deducted:

i) RM17 as SOCSO contribution; and

ii) RM120 for personal maintenance.

I therefore rounded up loss of future earnings to RM510 per month. The future loss thus amounted to RM97,920 (510 x 16 years x 12 months). I also allowed the appeal against future nursing care. I reduced the sum to RM200 per month. Costs of the future nursing care came to RM38,400 (RM200 x 16 x 12). I also reduced the award for daipers to RM57,600 (RM10 per day x 30 x 16 x 12). Since the defendant only succeeded in reducing the quantum and failed in his appeal against liability, I exercised my discretion and ordered that each party was to meet its own costs.

Being dissatisfied with my findings only on the issue of the non-applicability of the Employees' Social Security Act 1969 to this case, the defendants have appealed. This is my judgment on that issue.

Before I consider this issue it is pertinent to review the evidence led by both parties. PW1, the investigating officer of the case, testified that an accident had occurred at Jalan Pokok Macang Tasek Gelugor between the plaintiff and the said motorlorry. Whilst the accident had occurred on 2 October 1997 he knew of this accident only on 8 October 1997 at about 5.45pm when the 2nd defendant lodged a police report. In the said report the 2nd defendant had stated that as he was driving the said motorlorry along Jalan Pokok Macang Tasek Gelugor, the said motorlorry broke down. He telephoned his office and two foremen came to repair it. When the repairs were concluded he got into the lorry and started the engine and as his lorry moved he heard a shout from beneath his lorry. He found both the foremen beneath the said lorry. They dragged injured plaintiff out and sent him to hospital. From his evidence it was gathered that criminal proceedings were commenced against the driver of the said lorry. PW2, the foreman, testified that he was the plaintiff's employer. He produced a letter which he had signed which stated that the plaintiff was employed by him as a mechanic since 1 June 1995 and that he had paid his dues including the EPF deductions. He testified that the plaintiff had not returned to work after the accident. He continued to pay the plaintiff his salary for only two more months after the accident. Under cross-examination he admitted that he too was underneath the lorry, working with the plaintiff when the accident occurred. He confirmed that the owner of the said motorlorry at the material time was the 1st defendant. His workshop was called Siak Hor Motor. He also confirmed that when the repairs were being done to the lorry it was jacked up for about a foot. He was not beneath the lorry when the accident occurred. He was, at that time, beside the lorry

whilst the plaintiff was beneath it. His police report which was tendered, confirmed the same story. The defendants produced a monthly statement from Siak Hor Motor showing their compulsory contribution to the Social Security Fund made pursuant to the Employees' Social Security Act 1969 in respect of their employees. In that statement the plaintiff has been registered as an employee of the said Siak Hor Motor and a contribution on his behalf has been made by Siak Hor Motor towards the said Social Security Fund.

What is most significant in respect of the issue raised by the appellants in this appeal arose during the cross-examination of the plaintiff's employer by defence counsel. It was put to the witness by the defence that the accident did not occur along Jalan Pokok Macang Tasek Gelugor, but at his workshop. This was denied by the plaintiff's employer. The plaintiff himself testified and confirmed that the accident had indeed occurred at Jalan Pokok Macang Tasek Gelugor. His testimony was similar to that of his pleadings. He denied that the accident had occurred at the worksite.

For the purposes of considering the only issue under appeal it is relevant to reproduce the relevant applicable sections in the Employees' Social Security Act 1969.

The pre-amended s. 31 reads as follows:

> An insured person or his dependants shall not be entitled to receive or recover from the employer of the insured person, or from any other person who is the servant of the employer, any compensation or damages under any other law for the time being in force in respect of an employment injury sustained as an employee under this Act.

However, the Employees' Social Security (Amendment) Act 1997 (Act 981) which came into force on 27 January 1997 added the following proviso to the old s. 31. The said proviso reads:

> Provided that the prohibition in this section shall not apply to any claim arising from motor vehicle accidents where the employer or the servant of the employer is required to be insured against Third Party Risks under Part IV of the Road Transport Act 1987 (Act 333).

It is also necessary to reproduce the old s. 42 of the Act which reads as follows:

> When a person is entitled to any other benefits provided by this Act, he shall not be entitled to receive any similar benefit admissible under the provisions.

This s. 42 was however repealed by A981.

In the statement of claim the plaintiff has pleaded as follows:

> 1. Pada setiap masa motolori berdaftaran No. PDH 7799 adalah kepunyaan pihak Defendan Pertama.
>
> 2. Pada setiap masa pihak Defendan Kedua adalah pemandu motolori No. PDH 7799 serta pengkhidmat atau ejen atau dengan keizinan pihak Defendan Pertama.

The amended defence reads as follows:

> 1. Defendan-Defendan mengakui Kandungan perenggan 1 dan 2 Pernyataan Tuntutan.

It is clear therefore that the lorry in question PDH 7799 was owned by the 1st defendant trading as United Penang Trading and Transport Agency. A search made at the Registry of Business and enclosed in the appeal record shows that the 1st defendant was a sole proprietor of United Penang Trading and Transport Agency and that both his residence and principal place of business was at 1448 Kampong Selamat, Tasek Gelugor, Seberang Perai, 13300 Pulau Pinang. The nature of his business was stated as general commission agent, transport and tour agent and trading in timber. These businesses had nothing to do with motor repairs.

From the earlier submissions made before the Sessions Judge and which submission of the plaintiff was by consent put into the appeal record, I gathered that the lorry No. PDH 7799 and registered in the name of the 1st defendant was insured with Pacific and Orient Insurance Co. Berhad. Although the cover note was exhibited in an affidavit before the learned sessions judge, neither the said cover note nor the affidavits were included in the appeal record before me. However since there was no objection from the defendants/ appellants to the inclusion of the submission and since the defendants themselves in their submission did not deny that motorlorry PDH 7799 was at the material time insured with Pacific and Orient Insurance Co. Bhd., I hold that the said motorlorry was indeed at the material time insured with the Pacific and Orient Insurance Co. Berhad.

A search was also made at the Registry of Business in respect of Siak Hor Motor. The search was enclosed in the appeal record. This showed that Siak Hor Motor was a partnership comprising of four persons having first commenced the only business of motor repairs, on 19 March 1991. Two of the four partners were Chong Siak Hor, the sole proprietor of the 1st defendant, and PW2, who testified as the plaintiff's employer.

It is the case of the defendants that since Chong Siak Hor is also a partner of Siak Hor Motor which employed the plaintiff, the plaintiff is caught by s. 31 of the Act. In 1997 the Act was amended. It removed the draconian s. 42 which precluded a person in the position of the plaintiff from an entitlement to recover any other compensation under any Act once he is entitled to receive compensation pursuant to the Employees' Social Security Act 1969. Parliament in its wisdom saw the need to repeal this section and in addition, it added on the illuminative proviso to s. 31. Thus this proviso specifically protected persons like the plaintiff in this case who sued the owner and driver of the said lorry PDH 7799. The rights of the plaintiff to sue the owner and driver of the said lorry arise from the provisions of the Road Transport Act 1987 The said lorry was at the material time covered by a valid insurance. The insurers at the material time were Pacific and Orient Insurance Co. Berhad. In the circumstances it is my judgment that the proviso to s. 31 of the Act coupled with the repeal of s. 42 clearly meant that the plaintiff herein is entitled to make his claim against the owner and driver of the said motorlorry.

The defendants made a futile effort to suggest in cross-examination that the accident occurred not at Jalan Pokok Macang Tasek Gelugor but at the workshop in an attempt to suggest that the plaintiff had sustained an "employment injury" within the meaning of s. 31 of the Employees' Social Security Act 1969. I agree with the findings of the learned sessions judge who rejected this suggestion. Firstly if this was indeed the case then it ought to have been pleaded. Such a serious matter that goes to the root of the defendants' case, when they contend that the injury was at the repair shop, was not even pleaded. To my mind such a suggestion in cross-examination without any foundation being laid by way of pleadings, is unacceptable. Then there is the police report of the driver. In this report the driver of the said lorry at the material time confirmed that the accident occurred at Jalan Pokok Macang Tasek Gelugor. As for the admission of the lorry driver's police report the defendants contended that the said report was inadmissable. The defendants did not call the lorry driver to testify. However, even before the plaintiff closed his case he attempted to call the driver and this was objected to by the defence. It must be known that there is no proprietory right over a witness. Even a defendant is liable to be called as the plaintiff's witness subject, of course, to the risk of the defendant giving unfavourable evidence. Clearly the Sessions Court had erred in rejecting the plaintiff's request to allow the defendant driver to be called as a witness. As soon as the report was rejected by the court, the plaintiff closed his case. The defendants then proceeded to submit, no case to answer. In the circumstances clearly the plaintiff was entitled to

invoke the presumptive s. 114(g) of the Evidence Act 1950 against the defendants and to hold that the accident did indeed occur on the road as stated by the lorry driver in his police report and not at the worksite as was suggested in cross-examination.

Since the negligent act of the driver had caused the collision and since there is no appeal against this finding, the owner of the lorry becomes vicariously liable to the driver and the insurers Pacific and Orient Insurance Co. Berhad become liable by virtue of the provisions of the Road Transport Act 1987. There is no place for the Employees' Social Security Act 1969 in this case as the plaintiff is not an employee of the 1st defendant.